

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 UNITED STATES OF AMERICA,

5 -vs-

21 CR 703 (NSR) (PED)

PLEA

6 OCTAVIUS FRYAR,

7 Defendants.
8 -----x

9 United States Courthouse
10 White Plains, New York

11 Friday, March 4
12 11:00 a.m.

13 B e f o r e:

14 HONORABLE PAUL E. DAVISON,
15 Magistrate Judge

16 A P P E A R A N C E S:

17 DAMIAN WILLIAMS

18 United States Attorney for the
19 Southern District of New York

DEREK WIKSTROM,

20 Assistant United States Attorney

21 O'REILLY & SHAW

22 FRANCIS L. O'REILLY, ESQ.
23 Attorney for Defendant
24
25

1 THE DEPUTY CLERK: Good morning. This matter is being
2 conducted by video and telephone. This is the matter of the
3 United States v. Fryar, case number 21 cr 703.

4 Starting with the attorney for the Government, can you
5 please note your appearance for the record.

6 MR. WIKSTROM: Yes, good morning. Derek Wikstrom for
7 the Government.

8 THE COURT: I can barely hear Mr. Wikstrom.

9 (Off-the-record discussion)

10 THE COURT: All right. Thank you for your patience,
11 Mr. Fryar.

12 Brigid, why don't you call the case.

13 THE DEPUTY CLERK: Yes.

14 Good morning. This proceeding is being conducted by
15 video and telephone. This is the matter of the United States v.
16 Fryar, case number 21 cr 703.

17 Starting with the attorney for the Government, can you
18 please note your appearance for the record.

19 MR. WIKSTROM: Yes, good morning again, your Honor.
20 Derek Wikstrom for the Government.

21 THE COURT: Good morning, Mr. Wikstrom.

22 MR. O'REILLY: Good morning, your Honor. Francis
23 O'Reilly on behalf of Octavius Fryar, who's present by video
24 conferencing.

25 THE COURT: Good morning, Mr. O'Reilly.

1 All right, my understanding is that Mr. Fryar is
2 prepared to plead guilty to Count I of the Felony Information
3 pursuant to a plea agreement dated January 31st, 2022.

4 Is that correct?

5 MR. O'REILLY: Yes, it is, your Honor.

6 THE COURT: All right. And has Mr. Fryar previously
7 been arraigned on this Information?

8 MR. WIKSTROM: He has, your Honor.

9 THE COURT: All right.

10 Mr. Fryar, Judge Román has authorized this plea to be
11 conducted remotely. That's in a CARES Act order dated March 3,
12 2022, and docketed as Docket 40 in this matter. My
13 understanding is that one of the attorneys has a quarantine
14 issue which necessitates this. I want to make certain this is
15 acceptable to you.

16 Mr. O'Reilly has provided me with a copy of a written
17 consent form which indicates -- well, that he signed indicating
18 consent to proceed by video or teleconference. I want to make
19 certain that this is acceptable to you.

20 Do you recall discussing this with Mr. O'Reilly?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: All right. The form reads as follows.
23 I'm going to read it to you, and then I'm going to ask you if I
24 have your permission to sign it on your behalf.

25 "Defendant Octavius Fryar hereby voluntarily consents

1 to participate in the following proceeding via videoconferencing
2 or teleconferencing," and then the box is checked for "guilty
3 plea or change of plea hearing."

4 Is that acceptable to you, Mr. Fryar?

5 THE DEFENDANT: Yes, sir, your Honor.

6 THE COURT: And do I have your permission to sign that
7 written form on your behalf?

8 THE DEFENDANT: Yes, sir, your Honor.

9 THE COURT: Very well. The Court will execute the
10 consent form on Mr. Fryar's behalf and it will go into the court
11 record.

12 Mr. Fryar, this is not a trial. I am told you have
13 decided to enter a guilty plea in this case, so it's my job to
14 make sure you're aware of all of your rights and to verify that
15 any waiver of those rights is knowing and voluntary.

16 In addition, the Court has to make certain there is a
17 factual basis for your plea of guilty and it's important for you
18 to understand that the Court will not accept your guilty plea
19 unless the Court is satisfied that you are, in fact, guilty.

20 Do you understand?

21 THE DEFENDANT: Yes, sir, your Honor.

22 THE COURT: All right.

23 Now, this is a somewhat, heh, awkward format, we're
24 doing this remotely, and it's very important that you hear and
25 understand everything that goes on here, so if at any point you

1 don't hear me or understand what I say, I want you to interrupt
2 me, you can wave your arms to get my attention, but it's very
3 important that you hear and understand everything that goes on
4 here.

5 Will you do that? Will you let us know if you lose
6 the audio or you don't hear or understand something?

7 THE DEFENDANT: Yes, I will, your Honor.

8 THE COURT: Good.

9 Mr. Fryar, you have the absolute right to be
10 represented by a lawyer at this and every stage of the
11 proceedings against you and you have the right to consult your
12 attorney before you answer any questions.

13 Do you understand?

14 THE DEFENDANT: Yes, sir, your Honor.

15 THE COURT: All right.

16 You should take advantage of that right if you feel
17 the need, we could set up a private conference between you and
18 Mr. O'Reilly if necessary, we're not in any hurry here, so just
19 let us know if you need to talk to Mr. O'Reilly. Okay?

20 THE DEFENDANT: Yes.

21 THE COURT: Mr. Fryar, if you were to become
22 dissatisfied with Mr. O'Reilly's services, you would be entitled
23 to apply to the Court for a new attorney to represent you, and
24 if the Court was still satisfied that you could not afford to
25 hire a lawyer and was persuaded that there was an appropriate

1 reason to relieve Mr. O'Reilly, under those circumstances a new
2 lawyer would be appointed to represent you without cost to you.

3 Do you understand?

4 THE DEFENDANT: Yes, sir, your Honor.

5 THE COURT: All right.

6 Ms. Altimari, would you place Mr. Fryar under oath or
7 affirmation.

8 THE DEPUTY CLERK: Mr. Fryar, can you hear me?

9 THE DEFENDANT: Yes, ma'am.

10 THE DEPUTY CLERK: Mr. Fryar, you do solemnly swear or
11 affirm that the testimony you are about to give the Court in
12 this matter shall be the truth, the whole truth, and nothing but
13 the truth so help you God.

14 THE DEFENDANT: Yes, I do.

15 THE COURT: Can we figure out what's producing that
16 feedback loop and make it stop?

17 (Brief pause)

18 THE COURT: All right.

19 Mr. Fryar, you're now under oath. That means if you
20 knowingly make a false statement during this proceeding, you
21 could be prosecuted for perjury, you could face up to five years
22 in prison and a \$250,000 fine if convicted for that.

23 For the record, what's your full name?

24 THE DEFENDANT: Octavius Fryar.

25 THE COURT: How old are you, Mr. Fryar?

1 THE DEFENDANT: Fifty-three.

2 THE COURT: Do you read, write, speak, and understand
3 English?

4 THE DEFENDANT: Yes.

5 THE COURT: How far did you go in school?

6 THE DEFENDANT: I graduated high school.

7 THE COURT: Have you ever been hospitalized or treated
8 for narcotic or alcohol addiction?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: How long ago were you in treatment?

11 THE DEFENDANT: A couple of years ago, sir.

12 THE COURT: And what were you being treated for?

13 THE DEFENDANT: Cocaine, crack.

14 THE COURT: All right, let me ask you this. Is there
15 anything about your history of using cocaine or crack or any
16 other drug or any treatment that you received for that that's
17 interfering with your ability to understand what's going on here
18 this morning?

19 THE DEFENDANT: No, sir, your Honor.

20 THE COURT: Within the past 24 hours, have you used or
21 taken any drugs, marijuana, alcohol, medication or pills of any
22 kind?

23 THE DEFENDANT: No, sir, your Honor.

24 THE COURT: Are you feeling clear in your head today?

25 THE DEFENDANT: Yes, sir, your Honor.

1 THE COURT: Now, Mr. Fryar, have you received a copy
2 of the one-count Felony Information that's been filed with the
3 Court and gone over the charges with Mr. O'Reilly?

4 THE DEFENDANT: Yes, I have.

5 THE COURT: Mr. O'Reilly, does your client waive the
6 public reading?

7 MR. O'REILLY: Yes, your Honor. Thank you.

8 THE COURT: All right. Then we will proceed with what
9 is referred to as a plea allocution.

10 Mr. Fryar, I want you to understand that you have the
11 absolute right to have this plea allocution conducted before a
12 United States District Judge, here, the Honorable Nelson Stephen
13 Román to whom this case has been assigned. It is Judge Román,
14 the District Judge, who will impose sentence in this case.

15 I am a United States Magistrate Judge. If you consent
16 and agree, I will conduct the plea allocution here this morning
17 and I will then make a report to Judge Román in which I will
18 recommend whether or not Judge Román should accept your plea of
19 guilty. I'll make that recommendation based on information that
20 comes out at today's proceeding.

21 Do you understand?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Do you understand that you have an
24 absolute right to have this plea allocution conducted before a
25 United States District Judge?

1 THE DEFENDANT: Yes, I do.

2 THE COURT: Do you consent and agree that I should
3 conduct the plea allocution here this morning?

4 THE DEFENDANT: Yes, I do.

5 THE COURT: All right.

6 I have been provided with a written consent form which
7 indicates, Mr. Fryar, that you do consent to proceed before me
8 for this felony plea allocution, and it appears that Mr.
9 O'Reilly has signed this written consent form on your behalf.

10 Is that correct?

11 THE DEFENDANT: Yes, sir, your Honor.

12 THE COURT: You authorized Mr. O'Reilly to sign it for
13 you?

14 THE DEFENDANT: Yes, sir. Yes, I did.

15 THE COURT: And did Mr. O'Reilly read that consent
16 form to you before you authorized him to sign it?

17 THE DEFENDANT: Yes, he did.

18 THE COURT: Did anyone threaten you or coerce you or
19 promise you anything in order to get you to authorize Mr.
20 O'Reilly to sign this form on your behalf?

21 THE DEFENDANT: No, your Honor.

22 THE COURT: Did you give Mr. O'Reilly authority to
23 sign that form on your behalf freely and voluntarily?

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: All right.

1 Counsel, do either of you know of any reason why this
2 waiver and consent to proceed with a plea allocution before a
3 United States Magistrate Judge should not be accepted?

4 Mr. Wikstrom?

5 MR. WIKSTROM: No, your Honor.

6 THE COURT: Mr. O'Reilly.

7 MR. O'REILLY: No, your Honor.

8 THE COURT: All right. I find that Octavius Fryar is
9 fully competent and capable of waiving his right to appear
10 before a United States District Judge in order to enter his plea
11 of guilty. I, therefore, accept the consent form, which will be
12 signed and placed in the court record.

13 Mr. Fryar, do you understand that your right to be
14 represented by a lawyer continues through every stage of the
15 proceeding, including trial and appeal, and that you have this
16 right whether or not you choose to plead guilty to this offense?

17 THE DEFENDANT: Yes, I do, your Honor.

18 THE COURT: Mr. Fryar, have you had an adequate
19 opportunity to consult with Mr. O'Reilly about your case and
20 especially about your decision to plead guilty?

21 THE DEFENDANT: Yes, I have.

22 THE COURT: Are you satisfied with the services which
23 Counsel has provided to you in this case?

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: Have you told Mr. O'Reilly everything you

1 know about the case?

2 THE DEFENDANT: Yes, your Honor.

3 THE COURT: All right. There is, as I indicated
4 earlier, a written plea agreement. It's in letter form, it's
5 dated January 31st, 2022, it's addressed to Mr. O'Reilly in
6 reference to this case, and it appears to have been
7 countersigned by Mr. O'Reilly and signed, or countersigned, on
8 Mr. Fryar's behalf by Mr. O'Reilly today, March 4th, 2022.

9 Mr. Wikstrom, this is the operative plea agreement?

10 MR. WIKSTROM: Yes, it is, your Honor.

11 THE COURT: All right. The signed plea agreement will
12 be marked as a court exhibit.

13 Mr. Fryar, do you have a copy of this January 31st
14 plea agreement?

15 THE DEFENDANT: Yes, I do, your Honor.

16 THE COURT: And have you read that entire agreement?

17 THE DEFENDANT: Yes, I have.

18 THE COURT: And did you discuss the entire agreement
19 with Mr. O'Reilly?

20 THE DEFENDANT: Yes, your Honor.

21 THE COURT: Did Mr. O'Reilly answer any questions that
22 you had about that agreement?

23 THE DEFENDANT: Yes, sir, your Honor.

24 THE COURT: And did you authorize Mr. O'Reilly to sign
25 the agreement on your behalf?

1 THE DEFENDANT: Yes, sir, your Honor.

2 THE COURT: Mr. O'Reilly, did you review each and
3 every part of the plea agreement with your client?

4 MR. O'REILLY: Yes, your Honor.

5 THE COURT: Mr. Fryar, are you satisfied that you
6 understand this entire plea agreement?

7 THE DEFENDANT: Yes, sir, your Honor.

8 THE COURT: Do you have any questions for me or for
9 Mr. O'Reilly about what the plea agreement says?

10 THE DEFENDANT: No, sir, your Honor.

11 THE COURT: Does the plea agreement contain the
12 complete understanding between you and the Government in
13 connection with this case?

14 THE DEFENDANT: Yes, sir, your Honor.

15 THE COURT: Do you understand that anything which is
16 not set forth in the written plea agreement or placed on the
17 record at this time is not going to be binding on the outcome of
18 your case?

19 THE DEFENDANT: Yes, I do.

20 THE COURT: Mr. Wikstrom, is there anything apart from
21 the written plea agreement the Court should be aware of?

22 MR. WIKSTROM: No, your Honor.

23 THE COURT: Mr. O'Reilly, any other agreements the
24 Court should know about?

25 MR. O'REILLY: No, your Honor.

1 THE COURT: Mr. Fryar, did you authorize your attorney
2 to sign this agreement on your behalf freely and voluntarily?

3 THE DEFENDANT: Yes, sir, your Honor.

4 THE COURT: Did anyone force you or coerce you or
5 threaten you or promise you anything other than what is set
6 forth in the written plea agreement itself in order to get you
7 to sign the plea agreement?

8 THE DEFENDANT: No, sir, your Honor.

9 THE COURT: All right.

10 At this point, Mr. Fryar, the law requires me to
11 advise you of the maximum possible penalties to which you expose
12 yourself by pleading guilty to this charge. This is the
13 worst-case scenario. Do you understand?

14 THE DEFENDANT: Yes, sir, your Honor.

15 THE COURT: Okay.

16 First of all, the Felony Information charges you with
17 participating in an illegal conspiracy or agreement with other
18 people to distribute 28 grams or more of cocaine base, or crack.

19 Do you understand that charge?

20 THE DEFENDANT: Yes, sir, your Honor.

21 THE COURT: If you are convicted as charged for that
22 offense, you face a maximum term of imprisonment of 40 years,
23 you face a mandatory minimum term of imprisonment of 5 years,
24 you face a maximum term of supervised release of life and a
25 mandatory minimum term of supervised release of 4 years, you

1 face a maximum fine of the greater of \$50 million or twice the
2 gain or loss associated with the offense, and you also face a
3 \$100 special assessment, which is mandatory.

4 Now, with regard to any term of supervised release,
5 Mr. Fryar, if you are sentenced to a term of imprisonment, even
6 if you are sentenced to the maximum term of imprisonment, and
7 you are also sentenced to a term of supervised release, and if
8 you then violate the conditions of your supervised release,
9 under those circumstances you could be sentenced to an
10 additional term of imprisonment for violating the conditions of
11 your supervised release. In this case, you would face an
12 additional prison term of up to 3 years. Also, if you violate
13 the conditions of your supervised release, you're not going to
14 receive credit for time you already served in prison or for time
15 served on supervised release.

16 What that means here, Mr. Fryar, is if you were
17 sentenced to a term of imprisonment, even if you got the
18 maximum, which is 40 years, and you served all forty, and you
19 then went out on supervised release and you violated, the Court
20 could send you back to prison without a jury trial even though
21 you had already served the maximum.

22 Do you understand?

23 THE DEFENDANT: Yes, sir, your Honor.

24 THE COURT: You are also exposed to the possibility of
25 an order of forfeiture or restitution.

1 Mr. Wikstrom, is there some agreement in that regard?

2 (Brief pause)

3 MR. WIKSTROM: Sorry, your Honor, I got confused about
4 which mute button to press.

5 There's no restitution that's going to be sought here.
6 There is an agreement with respect to forfeiture that is
7 contained on the bottom of page 1 and the top of page 2 of the
8 plea agreement.

9 THE COURT: And, in fact, the agreement references a
10 consent order of forfeiture which is attached, but not actually
11 --

12 MR. WIKSTROM: That's -- yes, your Honor, the consent
13 order of forfeiture has not yet been prepared. However, the
14 Defendant is admitting to a forfeiture allegation in the plea
15 agreement and is agreeing to forfeit a sum of money equal to
16 \$5,833.

17 THE COURT: And is that the full extent of forfeiture
18 that the Government would be seeking here?

19 MR. WIKSTROM: It is, your Honor.

20 THE COURT: All right, thank you.

21 Mr. Fryar, do you understand that these are all
22 possible sentences that could be imposed following a plea of
23 guilty in this case?

24 THE DEFENDANT: Yes, sir, your Honor.

25 THE COURT: Are you a United States citizen?

1 THE DEFENDANT: Yes, I am, your Honor.

2 THE COURT: And are you a citizen by birth or by
3 naturalization?

4 THE DEFENDANT: Birth, your Honor.

5 THE COURT: All right. I ask you these questions, in
6 part, Mr. Fryar, because if you were not a United States citizen
7 or even if you were a naturalized citizen, a conviction in this
8 case could potentially have an adverse affect on your status,
9 but we don't have to discuss that further because you're a
10 natural-born citizen.

11 Do you understand you are pleading guilty here to a
12 felony offense and that a felony conviction may deprive you of
13 certain valuable civil rights which might include the right to
14 vote, the right to hold public office, the right to serve on a
15 jury, the right to possess any type of firearm, including rifles
16 and shotguns, the right to be considered for certain types of
17 employment or to be bonded or to serve in the U.S. military, and
18 the right to possess or obtain certain government-issued
19 licenses, including licenses that may be required in certain
20 professions and occupations?

21 Do you understand that.

22 (Brief pause)

23 THE COURT: Mr. Fryar, I did not hear your response.
24 We seem to have a problem here because I can't hear Mr. Fryar.

25 (Brief pause)

1 THE DEPUTY CLERK: We lost the audio.

2 MR. WIKSTROM: Yeah, I can't hear him either.

3 THE DEPUTY CLERK: Yeah, they need to dial him back
4 in.

5 (Brief interruption)

6 THE COURT: All right, Mr. Fryar seems to have
7 summoned assistance.

8 (Brief interruption)

9 THE COURT: All right, we have reestablished the audio
10 link with Mr. Fryar.

11 Mr. Fryar, the last thing I said to you was to explain
12 that by pleading guilty, you are giving up certain valuable
13 civil rights. Did you hear that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And do you understand it?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: All right. Let me explain to you further,
18 Mr. Fryar, that many of those civil rights, including the right
19 to vote, are controlled by state law and consequently, the
20 specific consequences of a felony conviction will vary from
21 state to state.

22 Do you also understand that one effect of a plea of
23 guilty to a narcotics offense is that it may render you
24 ineligible for certain federal and federally-funded benefits
25 that you might otherwise have been entitled to that might

1 include Social Security, food stamps, education loans or grants,
2 and public housing or housing subsidies?

3 Do you understand that?

4 THE DEFENDANT: Yes, sir, your Honor.

5 THE COURT: Mr. Fryar, do you understand that these
6 are all possible legal consequences of a guilty plea in this
7 case?

8 THE DEFENDANT: Yes, sir, your Honor.

9 THE COURT: Do you understand that the United States
10 Sentencing Commission has published guidelines for judges to
11 follow in determining the appropriate sentence to impose in a
12 criminal case?

13 THE DEFENDANT: Yes, sir, your Honor.

14 THE COURT: Do you also understand that the guidelines
15 are not mandatory, but must be considered by the Court, along
16 with other factors and other information, when the Court
17 determines the appropriate sentence to impose?

18 THE DEFENDANT: Yes, sir, your Honor.

19 THE COURT: Have you and Mr. O'Reilly talked about how
20 the sentencing guidelines would be calculated in your case?

21 THE DEFENDANT: Yes, sir, your Honor.

22 THE COURT: All right.

23 Now, the plea agreement that we talked about a couple
24 of minutes ago includes a stipulated guideline range of between
25 110 and 137 months of imprisonment. It also indicates that

1 subject to your ability to pay, the fine range in this
2 case...well, withdrawn. It's a little bit more complicated than
3 that and so, Mr. Fryar, what I just said is not entirely
4 correct.

5 The agreement indicates that there may be a dispute or
6 an unresolved issue in this case regarding whether or not you
7 fall under the career offender provisions of the sentencing
8 guidelines. You're aware of that issue?

9 THE DEFENDANT: Yes, sir, your Honor.

10 THE COURT: All right. And the calculation of your
11 sentencing guideline range is going to be different whether or
12 not Judge Román determines that you fall under career offender.
13 Do you understand that?

14 THE DEFENDANT: Yes, sir, your Honor.

15 THE COURT: The agreement indicates that if you fall
16 under career offender, then the guideline range is 188 to 235
17 months and the fine range is between \$30,000 and \$50 million.

18 You're aware of that?

19 THE DEFENDANT: Yes, sir, your Honor.

20 THE COURT: The agreement also indicates that if you
21 don't fall under career offender, then the guideline range is
22 110 months to 137 months and the fine range is between \$20,000
23 and \$50 million. You're aware of that?

24 THE DEFENDANT: Yes, sir, your Honor.

25 THE COURT: And you understand that Judge Román will

1 make the final decision about whether you are treated as a
2 career offender or not?

3 THE DEFENDANT: Yes, sir, your Honor.

4 THE COURT: Do you understand that regardless of
5 whether you fall under the career offender or don't fall under
6 the career offender, these ranges represent nothing more than an
7 understanding between you and your lawyer and Government Counsel
8 and those ranges are not binding on Judge Román when he imposes
9 sentence?

10 THE DEFENDANT: Yes, sir, your Honor.

11 THE COURT: Do you understand that Judge Román will
12 consider the guidelines, but will impose a sentence in
13 accordance with the applicable statute, which means the only
14 thing you can know for sure in this case is that the sentence
15 will not be more than 40 years, nor will it be less than 5
16 years?

17 THE DEFENDANT: Yes, sir, your Honor.

18 THE COURT: Do you understand that the Court will not
19 be able to determine the appropriate sentence to impose until
20 after a pre-sentence report has been prepared and after you and
21 your lawyer, as well as Government Counsel, have had an
22 opportunity to challenge the facts reported in the pre-sentence
23 report, as well as the calculation of the sentencing guideline
24 range and any sentence recommendation contained in that report?

25 THE DEFENDANT: Yes, sir, your Honor.

1 THE COURT: Do you understand that if there are
2 objections to the pre-sentence report, those objections will be
3 ruled on by the Court and if necessary, a hearing will be held
4 to determine what information is pertinent to the calculation of
5 your sentence?

6 THE DEFENDANT: Yes, sir, your Honor.

7 THE COURT: And you also understand that the Probation
8 Department will make a recommendation with regard to the career
9 offender treatment and then it will be up to Judge Román to make
10 a determination about that?

11 THE DEFENDANT: Yes, sir, your Honor.

12 THE COURT: Mr. Wikstrom, do we have an appeal waiver
13 in this agreement?

14 MR. WIKSTROM: We do, your Honor.

15 THE COURT: Can I ask you to summarize it for the
16 record.

17 MR. WIKSTROM: Certainly. So it begins -- just for
18 the record, it begins on the bottom of page 6 and continues on
19 to page 7.

20 In substance, the appeal waiver provides that the
21 Defendant will not directly appeal or collaterally challenge any
22 sentence within or below the range running from the low end of
23 the stipulated guidelines range to the high end of the higher
24 career-offender range. In other words, the Defendant won't
25 appeal or collaterally challenge any sentence within or below

1 the range of 110 to 235 months imprisonment, and that applies
2 regardless of the outcome of this dispute over the
3 career-offender provisions, and it's mutual in the sense that
4 the Government is prohibited from appealing any sentence within
5 or above that range of 110 to 235 months imprisonment.

6 In addition, the appeal waiver waives any appeal or
7 collateral challenge as to any fine that is less than or equal
8 to \$5 million on the part of the Defendant and waives as to the
9 Government any appeal of a fine greater than or equal to
10 \$20,000.

11 The parties are also agreeing not to appeal or bring
12 any collateral challenge to a forfeiture amount that is less
13 than or equal to \$5,833 and the Defendant is agreeing not to
14 appeal or collaterally challenge a special assessment less than
15 or equal to \$100.

16 As always, this appellate waiver does not prohibit
17 appeals or collateral challenges based on ineffective assistance
18 of counsel.

19 THE COURT: Do you understand this to mean, in effect,
20 that neither party can appeal Judge Román's determination as to
21 the career-offender application so long as Judge Román imposes a
22 guideline sentence?

23 MR. WIKSTROM: So long as Judge Román imposes a
24 sentence within either guidelines range, meaning that -- say the
25 Government loses on this issue and then the Defendant is

1 sentenced to 110 months, the Government would not be permitted
2 to appeal that, and, likewise, if Mr. Fryar loses the
3 career-offender issue and Judge Román imposes a sentence of 235
4 months, the top of the upper range, Mr. Fryar would have waived
5 his right to appeal or collaterally challenge that sentence.

6 THE COURT: Mr. Fryar, do you understand that one
7 effect of this plea agreement that you've entered into with the
8 Government is that you are giving up the right -- the rights
9 that you might otherwise have had to appeal or otherwise
10 challenge any sentence that does not exceed 235 months
11 imprisonment?

12 THE DEFENDANT: Yes, sir, your Honor.

13 THE COURT: And that means that if Judge Román rules
14 against you on the career-offender issue, you won't be able to
15 appeal unless the Judge gives you more than 235 months.

16 Do you understand?

17 THE DEFENDANT: Yes, sir, your Honor.

18 THE COURT: Now, do you also understand that you are
19 giving up the right to appeal or otherwise challenge any term of
20 supervised release, any fine that does not exceed \$5 million,
21 and any forfeiture that does not exceed \$5,833?

22 THE DEFENDANT: Yes, sir, your Honor.

23 THE COURT: Mr. O'Reilly, have you reviewed with your
24 client the first full paragraph on page 7 of the agreement
25 commonly referred to as the *Brady* waiver paragraph?

1 MR. O'REILLY: Yes, I have, your Honor.

2 THE COURT: Are you satisfied that Mr. Fryar
3 understands the consequences of that particular paragraph?

4 MR. O'REILLY: Yes, your Honor.

5 THE COURT: Mr. Fryar, do you understand that if you
6 disagree with Judge Román's sentencing decision, that will not
7 give you a basis to withdraw your plea of guilty?

8 THE DEFENDANT: Yes, sir, your Honor.

9 THE COURT: Do you also understand that parole has
10 been abolished in the federal system and that if you are
11 sentenced to a term of imprisonment, you will not be eligible
12 for early release on parole?

13 THE DEFENDANT: Yes, sir, your Honor.

14 THE COURT: Do you understand you do not have to plead
15 guilty, you have an absolute right to plead not guilty and to
16 have this case go to trial by judge or by jury?

17 THE DEFENDANT: Yes, sir, your Honor.

18 THE COURT: Do you understand that if you choose to
19 plead not guilty, you have a right to have a speedy and public
20 trial of your case?

21 THE DEFENDANT: Yes, sir, your Honor.

22 THE COURT: Do you understand that at any such trial,
23 you would be entitled to the presumption of innocence and that
24 the presumption would remain with you until the Government
25 proves each and every element of the crimes charged beyond a

1 reasonable doubt to the satisfaction of the judge if it's a
2 judge trial or to the unanimous satisfaction of the jury if it's
3 a jury trial?

4 THE DEFENDANT: Yes, sir, your Honor.

5 THE COURT: Mr. Fryar, at any such trial, you would
6 have the right, with the assistance of your lawyer, to confront
7 and cross-examine the witnesses against you. You would have the
8 right to call witnesses to testify on your behalf and to have
9 subpoenas issued to compel witnesses to come and testify. You
10 would also have the right to testify at your trial, but you
11 could not be forced to testify, and if you decided not to
12 testify, your decision to remain silent could not be held
13 against you in any way.

14 At your trial, you would also have the right I
15 described earlier to the assistance of a lawyer and to have a
16 lawyer appointed to represent you without fee if you could not
17 afford counsel.

18 Mr. Fryar, do you understand that if you plead guilty
19 to this offense, you will give up your right to a trial, and
20 except for the right to a lawyer, you will also give up all the
21 other rights which I have explained to you here?

22 THE DEFENDANT: Yes, sir, your Honor.

23 THE COURT: Mr. Fryar, have you clearly heard and
24 understood everything I've said?

25 THE DEFENDANT: Yes, sir, your Honor.

1 THE COURT: Do you have any questions for me or for
2 Mr. O'Reilly about anything I've said or anything I've asked
3 you?

4 THE DEFENDANT: No, your Honor.

5 THE COURT: All right.

6 Mr. Wikstrom, can I ask you to outline the elements of
7 the offense charged and then tell me what facts the Government
8 would be prepared to prove at trial to establish those elements.

9 MR. WIKSTROM: Yes, certainly, your Honor.

10 The elements of Count I are:

11 First, an agreement or understanding to violate the
12 federal drug laws between the Defendant and one other person;

13 Second, that the Defendant knowingly became a member
14 of that conspiracy;

15 And, third, that the overall scope of that conspiracy
16 involved at least 28 grams of mixtures and substances containing
17 a detectable amount of cocaine base.

18 In addition to proving those three elements, the
19 Government would also have to prove by a preponderance of the
20 evidence that venue was proper in the Southern District of New
21 York.

22 At trial, I expect the Government would prove that Mr.
23 Fryar conspired with others to distribute crack cocaine in and
24 around Newburgh, New York, between at least July 2020 and
25 November 2020.

1 The Government's evidence at trial would include,
2 among other things, law enforcement testimony about surveillance
3 of the Defendant and statements made by the Defendant,
4 recordings of statements made by the Defendant, and physical
5 evidence, including narcotics, seized from the Defendant and
6 drug paraphernalia and money seized from him.

7 THE COURT: Thank you.

8 Mr. Fryar, did you hear what the Assistant U.S.
9 Attorney just said?

10 THE DEFENDANT: Yes, sir, your Honor.

11 THE COURT: At this time, how do you wish to plead to
12 Count I of the Information charging you with knowingly
13 participating in an illegal conspiracy with other people to sell
14 at least 28 grams of crack cocaine?

15 THE DEFENDANT: Guilty, your Honor.

16 THE COURT: Has anyone threatened you or coerced you
17 or pressured you improperly in order to get you to plead guilty
18 to this charge?

19 THE DEFENDANT: No, sir, your Honor.

20 THE COURT: Has anyone made any promises to you other
21 than what is set forth in the written plea agreement in order to
22 persuade you to plead guilty?

23 THE DEFENDANT: No, sir, your Honor.

24 THE COURT: Has anyone made any specific promise to
25 you about what the sentence of the Court will be?

1 THE DEFENDANT: No, sir, your Honor.

2 THE COURT: All right, then, Mr. Fryar, you need to
3 tell me in your own words what you did that makes you guilty of
4 this offense.

5 THE DEFENDANT: I conspired with another person to
6 distribute 28 grams of cocaine base.

7 THE COURT: All right, let me follow up with a couple
8 of questions.

9 First of all, you conspired. Are you telling me that
10 you agreed with somebody else to jointly participate in the
11 acquisition and distribution of cocaine base, or crack cocaine?

12 THE DEFENDANT: Yes, sir, your Honor.

13 THE COURT: And did you do that at least between about
14 July 2020 and November 2020?

15 THE DEFENDANT: Yes, sir, your Honor.

16 THE COURT: And did you do that up in and around
17 Newburgh, New York?

18 THE DEFENDANT: Yes, sir, your Honor.

19 THE COURT: And that's in Orange County in the
20 Southern District of New York.

21 Did you commit these acts knowingly and willfully?

22 THE DEFENDANT: Yes, sir, your Honor.

23 THE COURT: Did you know it was against the law to do
24 what you were doing?

25 THE DEFENDANT: Yes, sir, your Honor.

1 THE COURT: Is there anything else which either
2 Counsel believes the Court needs to elicit from Mr. Fryar before
3 making the appropriate recommendation to Judge Román?

4 Mr. Wikstrom?

5 MR. WIKSTROM: No, your Honor. Thank you.

6 THE COURT: Mr. O'Reilly.

7 MR. O'REILLY: No, your Honor.

8 THE COURT: All right.

9 Mr. Fryar, just to confirm, you are consenting to the
10 forfeiture of \$5,833 here?

11 THE DEFENDANT: Yes, sir, your Honor.

12 THE COURT: Mr. O'Reilly, do you know of any reason
13 why the Court should not recommend acceptance of your client's
14 plea of guilty?

15 MR. O'REILLY: No, your Honor.

16 THE COURT: Mr. Wikstrom, do you know of any reason
17 why the Court should not recommend acceptance of this plea?

18 MR. WIKSTROM: No, your Honor.

19 THE COURT: Mr. Fryar, in light of everything that's
20 been said here today, is it still your wish to plead guilty to
21 the single count of the Felony Information?

22 THE DEFENDANT: Yes, sir, your Honor.

23 THE COURT: Very well.

24 Upon this allocution, I find that Defendant, Octavius
25 Fryar, is fully competent and capable of entering an informed

1 plea. The plea is knowing and voluntary and is supported by an
2 independent factual basis for each and every element of the
3 crime charged. Accordingly, I respectfully report and recommend
4 to Judge Román that the plea be accepted and that Mr. Fryar be
5 adjudged guilty of the offense charged in the Felony
6 Information.

7 I direct the Probation Department to conduct a
8 pre-sentence investigation.

9 Mr. Fryar, this is important. Arrangements will be
10 made for you to be interviewed by a probation officer. I'm sure
11 Mr. O'Reilly will assist you in preparing for that interview.
12 You're entitled to have your attorney participate in the
13 interview if you wish. You must be fully honest and truthful
14 during that interview, because if Judge Román learns that you
15 have provided false, incomplete, or misleading information, that
16 could be held against you at the time of sentencing.

17 Do you understand?

18 THE DEFENDANT: Yes, sir, your Honor.

19 THE COURT: All right.

20 Mr. Wikstrom, the case summary should go to Probation
21 within 14 days.

22 Mr. O'Reilly, you should promptly contact Probation
23 and make your client available for interview within that same
24 interval. I direct the reporter to provide a transcript of
25 these proceedings within 30 days setting forth my report and

1 recommendation to Judge Román. That transcript should come to
2 me for review.

3 Defendant is under an order of detention, Mr.
4 Wikstrom?

5 MR. WIKSTROM: Yes, your Honor.

6 THE COURT: That will continue. We'll adjourn for
7 sentencing.

8 Ms. Altimari, do we have a date and time?

9 THE DEPUTY CLERK: Yes. It will either be June 8th or
10 June 9th at ten a.m. on either day.

11 THE COURT: All right. Counsel should contact Judge
12 Román's chambers as those dates approach to firm up the date and
13 time of sentencing.

14 Mr. Wikstrom, just to confirm on the record, a 5(f)
15 warning has previously been given in this case?

16 MR. WIKSTROM: Yes, your Honor, in November of last
17 year, I believe this -- I believe your Honor gave a 5(f) warning
18 and then issued a written order.

19 THE COURT: Quite possible, but I can't confirm that.

20 MR. WIKSTROM: Heh, heh.

21 THE COURT: All right, is there anything else from the
22 Government?

23 MR. WIKSTROM: There is not. Thank you, Your Honor.

24 THE COURT: Anything else from you, Mr. O'Reilly?

25 MR. O'REILLY: No, your Honor. Thank you.

1 THE COURT: Very well. Then we'll stand in recess.

2 Good luck to you, Mr. Fryar.

3 THE DEFENDANT: Thank you, Your Honor. Have a nice
4 day.

5 THE COURT: You, too.

6 MR. WIKSTROM: Take care, everyone.

7 Certified to be a true and accurate transcript.

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TABITHA DENTE, SR. COURT REPORTER

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